Supreme Court, U.S.
FILED
FEB 25 2003
OFFICE OF THE CLERK

No. 02-924

IN THE

Supreme Court of the United States

MULVANEY MECHANICAL, INC.,
Petitioner,

v.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 38,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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The union has offered no persuasive reason for this Court to leave unreviewed the Second Circuit's rule—which conflicts with decisions of three other circuits and those of this Court—that an arbitrator, not a court, must make the threshold determination whether there remains an enforceable agreement to arbitrate after one party has clearly and unambiguously repudiated a contract's arbitration provisions. That inquiry, as we demonstrated in the petition (pp.11-20), presents a "question of arbitrability," which "is undeniably an issue for judicial determination." *AT&T Techs., Inc.* v. *Communications Workers*, 475 U.S. 643, 649 (1986). And this Court's unanimous opinion in *Howsam* v. *Dean Witter Reynolds, Inc.*, 123 S. Ct. 588 (2002), decided just this Term

and after the Court of Appeals issued its opinion below, dispels any doubt that the Second Circuit's decision squarely conflicts with established precedent. That decision warrants this Court's review. At the very least, the petition should be granted, the judgment below vacated, and the case remanded to the Second Circuit for reconsideration in light of *Howsam*.

1. In the petition (pp.16-18), we emphasized that the Second Circuit's rule—that it is for an arbitrator, not a court, to decide whether a party is contractually bound to arbitrate after another party has expressly repudiated the underlying contract—conflicts with this Court's long-standing precedents delineating the roles of courts and arbitrators. We thus quoted this Court's holding in *AT&T* that "arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit," 475 U.S. at 648 (quotation omitted), and cited three other decisions reaffirming this bedrock principle. *See First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995); *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 374 (1974); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). So, too, we noted that the inquiry into whether a party is contractually "bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the court." *Litton Fin. Printing Div.* v. *NLRB*, 501 U.S. 190, 208 (1991).

The union, however, never even cites—much less comes to grips with—these decisions. And therefore, not surprisingly, it never takes issue with us, nor attempts to explain why the Second Circuit's rule is, in fact, consistent with this Court's precedents. The union's silence is telling. As we argued in the petition (pp.16-17), once a party unambiguously repudiates a contract, the agreement becomes so fundamentally altered that questions about whether the parties remain bound by an original promise to arbitrate must be resolved by a court. That is because this Court's decisions make it abundantly clear that arbitration is "a matter of consent" and may

"not be imposed upon parties beyond the scope of their agreement." *Litton*, 501 U.S. at 201. Since that "question of arbitrability * * * is undeniably an issue for judicial determination," *AT&T Techs.*, 475 U.S. at 649, it is up to the courts—not, as the Second Circuit ruled, the arbitrators—to ensure that compelling the parties to submit to arbitration in the face of one party's unequivocal repudiation would not "operate without regard to the wishes of the contracting parties." *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995).

2. *Howsam* v. *Dean Witter Reynolds, Inc.*, *supra*, decided this Term after the decision below, draws the conflict between the Second Circuit's rule and this Court's precedents into even starker relief. As we explained in the petition (pp.18-20), in *Howsam* this Court unanimously held that the question of who decides a given issue—the court or the arbitrator—is a matter of "align[ing] (1) decisionmaker with (2) comparative expertise." 123 S. Ct. at 593. Under that practical approach, we went on to show that the Second Circuit got it backwards: arbitrators may have expertise on "law of the shop" type issues concerning particular employment practices, customs, or conduct, but it is the judiciary that has far greater institutional competence and expertise resolving legal questions concerning the extent to which a contract is modified or vitiated by one party's unambiguous repudiation.

The union again refuses to join issue. Nowhere in its brief does Local 38 cite the operative language from *Howsam*, nor challenge our contention that, under *Howsam*, the judiciary is the decisionmaker with the superior expertise to resolve such matters. Its silence is wise. As both the petition (p.17) and the brief of amici Mechanical Contractors Association of Connecticut and Plumbing-Heating-Cooling Contractors National Association demonstrate, *see* Br. of Amici 12-13, interest-arbitration panels are comprised largely—if not entirely—of members who lack any legal training or

familiarity with contract law and the doctrines of repudiation and rescission.

What the union eventually does get around to saying about *Howsam*—in all of six sentences—is demonstrably wrong. *See* Opp. 13-14. Local 38 takes comfort entirely in the fact that this Court quoted a previous decision for the proposition that "the arbitrator should decide 'allegations of waiver, delay or a like defense to arbitrability.' " *Id.* at 592 (quoting *Moses H. Cone Mem. Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)). Based on this slender reed and its unsubstantiated and wholly conclusory claim that "[r]epudiation is a similar defense that requires the evaluation of an arbitrator," Opp. 13, the union purports to bring the Second Circuit's rule into harmony with *Howsam*.

What the union fails to mention is that, immediately after referring to "allegations of waiver, delay or a like defense to arbitrability," this Court defined these "issues of procedural arbitrability" in such a way as to exclude questions of contract repudiation from their scope. 123 S. Ct. at 592. Quoting from the Revised Uniform Arbitration Act of 2000, this Court clarified that procedural arbitrability issues are limited to "whether *prerequisites* such as time limits, notice, laches, estoppel, and other *conditions precedent* to an obligation to arbitrate have been met." *Id.* (emphases added). Repudiation has nothing to do with whether a party has complied with such procedural prerequisites; rather, it goes to the very substance of the contract: has one party's manifest repudiation effectively vitiated the terms of the parties' agreement so that there is no longer an agreement to arbitrate? Resolving that question is a task clearly reserved for the courts. *See id.* at 591 ("The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability*,' is an 'issue for judicial determination * * *.' ") (emphasis in original) (quoting *AT&T Techs.*, 475 U.S. at 649).

The clear conflict between the decision below and this Court's decision in *Howsam* makes this case a good candidate for plenary review. But at the very least, given that the Second Circuit did not have the benefit of *Howsam* at the time it issued its opinion, this Court should grant the petition, vacate the judgment, and remand for further proceedings in light of *Howsam*.

3. The union also tries to sidestep the entrenched conflict between the decision below and the decisions of the First, Ninth, and Tenth Circuits. *See* Opp. 5-8. The only time the union even alludes to the rule adopted by the other circuits is when it offers a lengthy block quote from the First Circuit's decision in *Jones Motor Co.* v. *Teamsters Local No. 633*, 671 F.2d 38 (1st Cir.), *cert. denied*, 459 U.S. 943 (1982). *See* Opp. 7. Yet although the legal rule that then-Judge Breyer articulated is prominently set forth in that quoted passage, its inclusion appears to be entirely accidental; for Local 38 skips past it, focusing instead on the court's unremarkable factual observation that the conduct giving rise to repudiation there "took place after the complaint was filed." Opp. 7 (quoting *Jones Motor Co.*, 671 F.2d at 43). True, but irrelevant. The legal principle Judge Breyer announced in *Jones Motor Co.* had nothing to do with when the repudiator's conduct occurred but rather who—the court or the arbitrator—possessed the requisite expertise to evaluate the conduct and its implications. 671 F.2d at 43. Thus the First Circuit ruled that while some issues—such as "what facts occurred"—are "well suited to an arbitrator's expertise," others—such as the implications of a party acquiescing in litigating its claims or affirmatively disavowing the underlying contract—"call[] for the expertise of a judge, not an arbitrator." *Id.* This, as we pointed out in the petition (pp.14-15, 19), is the same formulation that Justice Breyer announced for the unanimous Court in *Howsam*. The union, however, has shown no interest in addressing the substance of either case.

As for the Ninth Circuit's decision in *California Trucking Ass'n* v. *Brotherhood of Teamsters & Auto Truck Drivers, Local 70*, 679 F.2d 1275 (9th Cir. 1981), *cert. denied*, 459 U.S. 970 (1982), and the Tenth Circuit's decision in *Reid Burton Constr., Inc.* v. *Carpenters Dist. Council*, 535 F.2d 598 (10th Cir.), *cert. denied*, 429 U.S. 907 (1976), the union does nothing more than reprise its argument that in those cases "again * * * the change in position [by the repudiators] occurred in the District Court case under review." Opp. 6.[1] But as we explained in the petition (pp.15-16), the rule adopted by these courts cannot be so artificially narrowed in scope. That is because, when one party unequivocally repudiates its contractual duty to arbitrate, the effect is the same, regardless of whether the repudiatory conduct occurred in a parallel proceeding or in a case directly before the district court. Indeed, the Ninth Circuit held without qualification in *California Trucking* that "[o]ne who flatly repudiates the provision for arbitration itself should have no right to the stay of a court action brought by the other party." 679 F.2d at 1283 (quotation omitted). Simply put, whether unambiguous repudiatory conduct "occurred in the District Court case under review," Opp. 6, or in a prior judicial forum, the inquiry into whether an agreement to arbitrate survives repudiation "calls for the expertise of a judge, not an arbitrator." *Jones Motor Co.*, 671 F.2d at 43. Certiorari is warranted to review this conflict among the circuits.

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[1] Virtually out of nowhere, the union suggests during its discussion of these cases that "[b]y not moving, in court, to block the arbitration proceeding, Mulvaney was acquiescing in Local 38's decision to have the arbitrators decide their defenses." Opp. 6. The union is completely wrong. Mulvaney "appeared at the National Adjustment Board's hearing solely to challenge jurisdiction." Pet. App. 8a. Having preserved its objection to the arbitrators' jurisdiction, Mulvaney properly raised that same challenge in the district court when it moved to vacate the award—precisely the same course of action the respondents took in *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. at 940.

4. Local 38 elsewhere in its brief seems to suggest that review is unwarranted because the extent of its repudiation is not apparent from the record. That is simply not the case. To begin with, Local 38 itself concedes in its brief that it "repudiate[d] the collective bargaining agreement * * * during the NLRB administrative proceeding." Opp. 5. Nevertheless the union stresses that it "did not *consistently* repudiate the collective bargaining agreement or the arbitration clauses contained in the contract." *Id.* (emphasis added). Our point exactly. The union repudiated the collective bargaining agreement when doing so advanced its interests, but then repudiated its repudiation once it realized greater advantage could be had by tacking to a new course. As explained in the petition (pp.11, 20) and in the brief of amici (pp.19-20), rewarding that sort of opportunistic behavior undermines the good-faith bargaining principles on which labor law is founded, threatens to disrupt the industrial peace that collective bargaining agreements and no-strike clauses are intended to foster, and severely frustrates the need for certainty in connection with large-scale labor issues.[2]

5. Finally, the union never addresses the second questions presented by the petition: whether traditional contract principles of repudiation and rescission apply to collective bargaining agreements. The Second Circuit, as we pointed out in the petition (p.21), recognized that this Court's deci-

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[2] Local 38 also maintains that, while it repudiated the collective bargaining agreement in the district court proceeding, its repudiation was somehow limited to the multi-employer association, not Mulvaney, because the association was the only party to that proceeding. Opp. 1-2. Nevermind that Mulvaney was a member of that very association, the union is wrong on its facts. As we noted in the petition (p.6), the district court action was brought by both the association *and* an individual sheet-metal contractor. The union never explains how it could selectively repudiate the same collective bargaining agreement so that it would bind some sheet-metal contractors but not others.

sion in "*Drake Bakeries* left open" that question. Pet. App. 15a. The court below also acknowledged that, on the open *Drake Bakeries* question, "the authorities are divided regarding the wisdom of applying traditional contract principles to disputes concerning an alleged termination of a collective bargaining agreement." *Id.* 16a. In the petition (pp.22-28), we explained how the Ninth, Tenth, and D.C. Circuits have held that the doctrines of repudiation and rescission apply with full force to collective bargaining agreements,[3] while the First Circuit has taken the opposite view,[4] and the Third Circuit appears to be internally split.[5]

Nowhere does the union cite these cases, much less acknowledge, as the Second Circuit did, that the circuits "are divided" on this important question. Pet. App. 16a. Instead, the union devotes four pages to *Drake Bakeries* in an effort to suggest that there is nothing for this Court to resolve. Opp. 9-12. Yet for all the lengthy quotations set forth in its brief, the one passage the union surprisingly neglects to reproduce is the one that has divided the circuits: "We do not decide in this case that in no circumstances would a strike in violation of the no-strike clause contained in this or other contracts entitle the employer to rescind or abandon the

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[3] *Boeing Airplane Co.* v. *Aeronautical Indus. Dist. Lodge No. 751*, 188 F.2d 356, 357 (9th Cir.), *cert. denied*, 342 U.S. 821 (1951); *United Elec. Radio & Machine Workers of Am., Local 1113* v. *NLRB*, 223 F.2d 338, 341-342 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 981 (1956); *NLRB* v. *Northeast Okla. City Mfg. Co.*, 631 F.2d 669, 677 (10th Cir. 1980).

[4] *Trailways of New England, Inc.* v. *Amalgamated Ass'n of Street, Elec. Ry & Motor Coach Employees*, 343 F.2d 815, 817 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965).

[5] *Compare Children's Rehab. Ctr., Inc.* v. *Service Employees Int'l Union, Local No. 227*, 503 F.2d 1077, 1079 (3d Cir.), *cert. denied*, 419 U.S. 1090 (1974), *with United Steelworkers of Am.* v. *NLRB*, 530 F.2d 266, 280 (3d Cir.), *cert. denied*, 429 U.S. 834 (1976).

entire contract or to declare its promise to arbitrate forever discharged * * *." *Drake Bakeries, Inc.* v. *Local 50, Am. Bakery & Confectionery Workers Int'l*, 370 U.S. 254, 265 (1962). This is the question the Second Circuit acknowledged was "open," and this is the question on which the circuits remain hopelessly conflicted.

* * * *

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted. Alternatively, the Court should grant the petition, vacate the judgment below, and remand for reconsideration in light of this Court's intervening decision in *Howsam* v. *Dean Witter Reynolds, Inc.*, No. 01-800 (Dec. 10, 2002).

Respectfully submitted,

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